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ORIGINAL
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OCT 15 2007

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SI

C 07 5251
CV NO:

ZHIGANG BAI and JINGXU ZHAO

Plaintiffs,

vs.

EMILIO T. GONZALEZ, Director of the
United States Citizenship and Immigration
Services; UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES;
MICHAEL CHERTOFF, Secretary of the
Department of Homeland Security;
PETER D. KEISLER, Acting United States
Attorney General; ROBERT MUELLER, Director
of the Federal Bureau of Investigations; and
FEDERAL BUREAU OF INVESTIGATIONS

Defendants.

COMPLAINT FOR A WRIT IN
NATURE OF MANDAMUS TO
COMPEL ADMINISTRATIVE
ACTION

IMMIGRATION CASE

I. INTRODUCTION

1. Plaintiffs are husband and wife respectively. Plaintiffs are seeking mandamus to
compel Defendants to complete the background investigation and adjudication of their

1 Applications for Adjustment of Status (Form I-485) currently pending with the Citizenship and
2 Immigration Services.

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4 **II. PARTIES**

5 2. Plaintiffs, Zhigang Bai and Jingxu Zhao, husband and wife, are natives and citizens of
6 China and reside in Fremont, California. Zhigang Bai is employed by Western Digital
7 Technologies, Inc. in Fremont, California. The alien numbers for Plaintiffs are A99 054 496 and
8 A99 054 497, respectively.

9 3. Defendant, Emilio T. Gonzalez, is the Director of the United States Citizenship and
10 Immigration Services. He is sued in his official capacity.

11 4. Defendant, United States Citizenship and Immigration Services is the agency
12 responsible for implementing the provisions of the Immigration and Nationality Act and is the
13 successor agency to the Immigration and Naturalization Service.

14 5. Defendant, Michael Chertoff, is the Secretary of the United States Department of
15 Homeland Security, which oversees the United States Citizenship and Immigration Services. He
16 is sued in his official capacity.

17 6. Defendant, Peter D. Keisler, is the Acting Attorney General of the United States. He
18 is sued in his official capacity.

19 7. Defendant, Robert Mueller, is the Director of the Federal Bureau of Investigations,
20 the federal agency that is responsible for completing security checks and background clearances
21 of foreign nationals seeking immigration benefits from the United States Citizenship and
22 Immigration Services.

23 8. Federal Bureau of Investigations is the federal agency, which is responsible for
24 completing security checks and background clearances of foreign nationals seeking immigration
25 benefits from the United States Citizenship and Immigration Services.

III. JURISDICTION AND VENUE

9. This is an action for mandamus and injunctive relief in accordance with the provisions of 28 U.S.C. § 2201 and § 2202 (2006), and is brought for the purpose of determining a question of actual controversy between the parties, as more fully explained in the remainder of this complaint.

10. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1331 (2006), this being an action which arises under the Constitution and laws of the United States, specifically the Immigration and Nationality Act, 8 U.S.C. § 110, et seq. (2006); pursuant to 28 U.S.C. § 2201 (2006); pursuant to 8 U.S.C. § 1329 (2006), this being an action arising under the provisions of the Immigration and Nationality Act; pursuant to 28 U.S.C. § 1361 (2006), this being an action in the nature of mandamus to compel officers and employees of an agency of the United States to perform duties owed to Plaintiffs; and pursuant to 5 U.S.C. § 701, et. seq. (2006), this being an action alleging violation of the Administrative Procedure Act.

11. Jurisdiction of this court is not limited by 8 USC § 1252(a)(2)(B) or the REAL ID Act, P.L. 109-13, 119 Stat. 231 (May 11, 2005), as this is a writ of mandamus action seeking to compel the government to perform nondiscretionary duties that are required by law. See e.g., Montero-Martinez v. Ashcroft, 277 F.3d 1137 (9th Cir. 2002).

12. Venue properly lies in this Court pursuant to the provisions of 28 U.S.C. §§1391(e) and 1402 (2006) and 5 U.S.C. § 703 (2006).

13. Plaintiffs allege eligibility for payment of reasonable attorney's fees under the terms of the Equal Access to Justice Act pursuant to 28 U.S.C. § 2412 (2006) and 5 USC § 504 et seq. (2006).

1 **IV. INTRADISTRICT ASSIGNMENT**

2 14. Pursuant to Civil L.R. 3-2, the San Francisco division has jurisdiction over this
3 matter as Plaintiffs reside in Alameda County.
4

5 **V. FACTUAL BACKGROUND**

6 15. Plaintiff Zhigang Bai is a Ph.D. graduate in Computer Engineering from Carnegie
7 Mellon University in Pittsburgh, Pennsylvania and is currently employed by Western Digital
8 Technologies, Inc. in Fremont, California as a Principal Engineer.

9 16. On or about August 10, 2005, Western Digital Technologies, Inc. filed with the
10 Citizenship and Immigration Services, California Service Center, an Immigrant Visa Petition
11 (Form I-140) on behalf of Plaintiff Zhigang Bai. On or about September 22, 2005, Plaintiffs
12 Zhigang Bai and Jingxu Zhao filed with the Citizenship and Immigration Services, California
13 Service Center, Applications to Adjust Status (Form I-485) based upon the Immigrant Visa
14 Petition (Form I-140) filed by Western Digital Technologies, Inc.
15

16 17. On or about January 26, 2006, the Citizenship and Immigration Services approved
17 the aforementioned Immigrant Visa Petition (Form I-140).

18 18. The Applications for Adjustment of Status (Form I-485) filed by Plaintiffs Zhigang
19 Bai and Jingxu Zhao are still pending with no resolution.
20

21 **VI. CAUSES OF ACTION**

22 **A. FACTS SUPPORTING MANDAMUS**

23 19. Plaintiffs filed their Applications for Adjustment of Status (Form I-485), as
24 previously described, with Defendants, pursuant to 8 USC §1255 (2006). Defendants have
25 accepted the applications and the corresponding filing fees paid by Plaintiffs. However, through
26 purposeful acts, negligence, poor management and/or inattention, Defendants have failed to
27

1 complete the ministerial actions that would result in allowing them to adjudicate Plaintiffs'
2 applications.

3 20. Several inquiries have been submitted requesting information regarding the current
4 status of Plaintiffs' applications. These inquiries were submitted in accordance with the
5 procedures established by Defendants for such purposes.
6

7 21. Defendants have not taken action to complete the adjudication of said applications in
8 this action despite these numerous inquiries and requests.

9 22. Defendants have adjudicated similar applications filed by persons who are not parties
10 to this action and which were filed subsequent to the applications filed by Plaintiffs.

11 23. Defendants do not employ any reasonable system to safeguard that: (1) files are
12 centrally monitored to guarantee that they are being closed out on a rational, efficient and
13 nonpreferential basis; or (2) applicants are provided with information on the status of files that
14 have not been adjudicated on a timely basis.
15

16 24. Plaintiffs have been denied due process of law under the terms of the Fifth
17 Amendment to the United States Constitution by Defendants' neglect and refusal to take action to
18 adjudicate Plaintiffs' applications.

19 25. Plaintiffs have suffered and continue to suffer irreparable harm as a result of
20 Defendants' delay and refusal to take action. This harm includes, but is not limited to: an
21 unreasonable delay in establishing eligibility for United States citizenship and the privilege that
22 come with it, such as voting; inability to relocate; inability to receive promotions or otherwise
23 advance in their career; separation from family; inability to obtain home loans; and generally,
24 continuing mental distress resulting from their unsettled legal condition.
25
26
27

26. There is no reasonable basis for Defendants' position and it is not substantially justified under the law.

27. Defendants have in their possession all information necessary to complete the adjudication of Plaintiffs' applications. Defendants' refusal to complete this administrative processing is a disregard of their official duty and Plaintiffs are wholly without remedy, under the circumstances, unless mandamus is ordered by this Court.

B. VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

28. The Administrative Procedure Act (hereinafter "APA") provides categorically that: [t]he reviewing court shall-

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
 - A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law; [or]
 - B) contrary to constitutional right, power, privilege or immunity....

5 U.S.C. § 706 (2006). Defendants' conduct in failing to process Plaintiffs' Applications for Adjustment Status is in violation of the APA.

29. The APA provides categorically that "within a reasonable time, each agency shall proceed to conclude any matter presented to it." 5 U.S.C. § 555(b) (2006). In recognition that a failure or unwarranted refusal to adjudicate should be enjoined, Congress provided that courts may review the inaction of an agency and specifically "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (2006).

30. Defendants' conduct in failing to process Applications for Adjustment of Status, as described in the aforementioned allegations, is capricious and arbitrary and results in severe and

1 unwarranted delay to Plaintiffs in obtaining valuable immigration and citizenship benefits. The
2 delay so incurred is tantamount to a violation of the APA, 5 U.S.C. § 555 and §706 (2006).

3 31. Plaintiffs have suffered and continue to suffer severe and irreparable injury for
4 which they have no adequate remedy at law.
5

6 **VII. PRAYER FOR RELIEF**

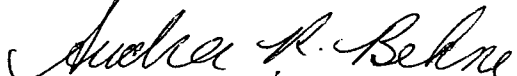
7 WHEREFORE, Plaintiffs pray that:

- 8 1. Judgment is entered ordering Defendants to forthwith adjudicate Plaintiffs'
9 Applications for Adjustment of Status;
10 2. Defendants be permanently enjoined from refusing to communicate with attorney for
11 Plaintiffs regarding the status of their case;
12 3. Defendants be ordered to pay the cost of suit herein;
13 4. Defendants be ordered to pay Plaintiffs' reasonable attorney's fee for this action; and
14 5. The Court grants such other and further relief as it may deem to be necessary and
15 proper.
16

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18
19 Dated: October 11, 2007

Respectfully submitted,

20 LAW OFFICES OF AUDRA R. BEHNÉ

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22 AUDRA R. BEHNÉ
23 Attorney for the Plaintiffs
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